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MONTANA LEGISLATIVE HISTORY

Chapter Tabled ~~19~~ 2001

Bill H _____ S 266 Original bill & history ____C

H. Committee on _____		S. Committee on Judiciary	
Hearing Date(s) _____	____C	Hearing Date(s) 1-25	✓ C
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Date Out _____	____C		

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

HEARING ON SB 266

Sponsor: SEN. JON ELLINGSON, SD 33, MISSOULA

Proponents:
Kris Marsh, representing herself
Karl Olsen, Pride
Daniel Casey, Montana Human Rights Network
Sandra Hale, representing herself
Patti Keebler, MT AFL-CIO
Colleen Murphy, National Association of Social Workers
Brenda Wahler, mother of gay daughter
Beth Brenneman, legal director of ACLU of Montana
Al Smith, Montana Trial Lawyers Association

Opponents:
Jenny Dodge, representing self
George Bennett, Montana Bankers
Julie Millam, Christian Coalition
Tom Rasmussen, representing self
Dr. William Wise, representing self
Dallas Erickson, Montana Citizens for Decency through Law
Lisa Lovell, representing self
Arlene Diehl, retired home educator
Gary Guthrie, representing self
Harris Himes, representing self
Phyllis Lamping, proxy for man from Bozeman

Opening Statement by Sponsor:

SEN. JON ELLINGSON, SD 33, MISSOULA, opened on SB 266. He argued that there was not any principle more fundamental to the character of the republic and society than quality of opportunity. He posed that economic status, gender, race, and religion were meaningless distinctions when measured against the uniquely American ideal that all were created equal and all were entitled to equality of opportunity. He proposed that each person should progress or fail in jobs and professions based upon the objective quality of the job performance. In fact, he said there could be no equality of opportunity if on-the-job success or failure did not flow from the quality of the job performance. SB 266 addressed a group of citizens and neighbors who could not yet benefit from full equality of opportunity. These people had a sexual orientation (gay, lesbian, or bisexual), which differed from the majority. He discussed how and to what extend this

problem was addressed by this legislation. He requested amendments to the draft of the bill, **EXHIBIT(jus20a17)** and distributed a highlighted copy of Wrongful Discharge from Employment, **EXHIBIT(jus20a03)**. The bill would fit into the highlighted areas. He noted wrongful discharge did not apply to situations covered by collective bargaining agreements, which used a written employment agreement, or those covered by the Montana Human Rights Act, or it's federal equivalent. However, if the employment situation was not covered by those exceptions, the Wrongful Discharge Act would apply. He referred attention to 39-2-904, of **exhibit (3)**. It defined the elements of wrongful discharge. SB 266 addressed sub2 by not changing the existing law; an employer could discharge an employee within the probationary period for any reason, including sexual orientation. He noted it was almost an absolute right to discharge during the probationary period, and SB 266 did not touch that right. However, if the probationary period passed and there was no good cause for discharge, then the discharge following the probationary period would be wrongful. He defined good cause using subsection 5 of 39-2-903 of **exhibit (3)**. SB 266 would add to that definition by including sexual orientation as stated at the bottom of **exhibit (3)**. The effect of this passed legislation would be that an individual with a different sexual orientation from the majority, who successfully passed through the probationary period of employment and because the job performance was satisfactory and the employer had decided to retain the employee, then that employee could not be discharged for being gay, lesbian, or bisexual. He argued it balanced the rights of the employers during the probationary period.

{Tape : 1; Side : B}

Then following the probationary period, the employees merit should be based ONLY on his/her job related performance and not upon the character of his/her private life. He felt it was an element of simple, fundamental fairness. This bill retained the commitment of equality in opportunity in the work place. He noted SB 266 did not ask for special rights; it only asked that the rights and opportunities enjoyed by the rest of the population not be denied because of sexual orientation. He said that as much as senators differed on political points, the quality of the individuals in the Senate was one that constantly impressed him and made him feel good about the service they provided to the state. He doubted that anyone was comfortable with endorsing the notion of discrimination. However, he respectfully suggested that by rejecting SB 266, it enabled discrimination, and made it acceptable. He believed that no one truly believed it in their hearts. He said discrimination hurt not only the victim, but also the spirit of all when an individual was denied the

fundamental and equal right to equality of opportunity simply because of a quality in that person, which most do not like. He posed a question: "Did taking a firm stance against discrimination in the workplace constitute an endorsement of homosexuality?" No. Questioning of that lifestyle did not disallow the belief that punitive discrimination based upon sexual orientation was not right and not acceptable in the state of Montana.

Proponents' Testimony:

Kristine Marsh, representing herself, provided her supportive testimony for SB 266; **EXHIBIT(jus20a04)**.

Karl Olsen, Pride, presented his supportive testimony, **EXHIBIT(jus20a05)**.

Daniel Casey, Montana Human Rights Network, provided his supportive testimony, **EXHIBIT(jus20a06)**.

Sandra Hale, representing herself, announced she was a gainfully employed lesbian with Lewis and Clark County in the field of public health. She strongly supported SB 266. She said as a lesbian, she should be judged on whether or not she held her job based on the qualifications and the ability to competently perform the job, not on some trait or characteristic subject to her employer's whimsy or personal prejudices. She noted the economic and employment opportunities of Montana were dwindling, not burgeoning, so she urged them not to make it even less attractive for people to come to Montana to work based on possibilities of job discrimination. She reiterated that former **Governor Racicot** recommended to the Department of Administration to insert into the state personnel policies for employees non-discrimination language based on sexual orientation and equal employment opportunity clauses. She called herself a coward and remiss for not publicly thanking the former governor for his stance because she was afraid that if she thanked him publicly, then the legislature and the current administration would take back those basic rights that he enabled. Therefore, she went out on a limb to thank **Governor Racicot** and **SEN. ELLINGSON** for doing the right, fair, and just thing. She hoped that she would be able to come to the legislature at the end of the session to also thank them for granting basic rights, not special rights, to more of Montana's employees. She provided a written statement as well, **EXHIBIT(jus20a07)**.

Patti Keebler, MT AFL-CIO, presented her testimony, **EXHIBIT(jus20a08)**.

Colleen Murphy, National Association of Social Workers, presented her supportive testimony, **EXHIBIT(jus20a09)**.

Brenda Wahler, mother of gay daughter, supported the bill because she feared her daughter would be treated negatively because of her sexual orientation. She emphasized that this bill did not ask for anything special, merely the same rights that everyone else enjoyed, which was the right to make a living. She felt it was important because young people could not remain dependent on their parents forever, and they shouldn't go on welfare because they couldn't find work. She said her daughter had a job and had a supportive employer, but she couldn't know what the future would bring.
{Tape : 2; Side : A}
She urged a Do Pass on behalf of Montana parents of homosexual children.

Beth Brenneman, legal director of ACLU of Montana, supported the bill because they felt job decisions should be based upon an employees' job skills and job performance, not on their sexual orientation. They felt it was common sense, in fact, they believed it was good business practice. The majority of Americans agreed with that as **Ms. Murphy's** testimony pointed out. She said that so many people agreed with them that some people already thought it was illegal to fire someone for their sexual orientation only. Of course, people were shocked nationally when they heard about the story of a woman who had just a week before she was terminated for being a lesbian was offered a management position. It of course affected her ability to make a living and her income was very profoundly affected. However, one of the greatest effects that the termination had was that she began to believe that her job performance was irrelevant. She could be outstanding, but still be evaluated based upon her private life. The ACLU believed that job performance was relevant and that should be the basis of all job decisions.

Al Smith, Montana Trial Lawyers Association, provided his supportive testimony, **EXHIBIT(jus20a10)**.

<u>Opponents' Testimony</u>:

Jenny Dodge, representing self, provided testimony in opposition to SB 266, **EXHIBIT(jus20a11)**.

George Bennett, attorney for the Montana Bankers Association, said that **Ms. Dodge** had made a better legal argument than he could. He said banks were vitally concerned about jobs, and they lived through the wrongful discharge nightmare when the Supreme Court took away the statute, which was probably unfair, that allowed discharge at will. It was a situation of conflicting Supreme Court decisions so that employers did not know where they stood. Employers were afraid to hire people they hadn't known all their lives and were afraid to discharge employees no matter how disruptive or how poor their performance. Montana adopted a uniform Wrongful Discharge Act in about 1987 and it worked very well. It was looked at by legal scholars as a model act. He emphasized the discussion was about wrongful discharge where some other federal or state statute did not apply. [left out his references to the anonymous letter.] He reiterated that a non-probationary employee could not be discharged except for good cause, as stated in the statute. He went on to recall the elements of the statute for which a person could not be terminated; for being Irish, for being Lutheran, for being gay, or because they had big feet. He said those reasons were wrongful discharge and the employer would be liable. He felt that someone being terminated for being gay would be a wrongful discharge. However, he said that sexual orientation was not self-evident and asked how that would be proven. He brought up the military's "Don't Ask, Don't Tell" policy. He argued that this bill gave the unscrupulous, and their lawyers, a weapon, instead of a shield against discrimination. By opposing the bill, it could be viewed as intolerance. He resented that as a lawyer, because he believed that lesbians and homosexuals were brothers and sisters and were entitled to respect and equal protection of the law, but not unequal protection as this bill would do. He felt it would be a war of false claims against employers.

Julie Millam, Christian Coalition, provided opposing testimony, **EXHIBIT(jus20a12)**.

Tom Rasmussen, representing self, abhorred any sort of discrimination and thought all people did. He said fortunately, the Founding Fathers felt that way too. He read Article 14 of the U.S. Constitution, and the Montana Constitution, Article 2, section 4. He felt those were clear enough, but that the world was imperfect and some people were discriminated against. He said it cut across all groups of people. However, the law was clear. He argued that thousands of people did change their sexual orientation to resume a normal sexual life. With the job situation in Montana, more jobs were needed. However, SB 266

adversely affected Montana employers. He stood strong that the law was clear enough already and there was no need for the bill.

Dr. William Wise, representing self, stated he was a retired doctor of internal medicine. He told a personal story about interviewing a secretary and asking her whether she was married. She reported him to the Human Rights Commission. He found it was illegal to ask about a person's marriage status, religion, and now, this would include sexual orientation. He felt employers should be able to discharge an employee if they were doing a poor job and not have to worry about the person's religion, race, or sexual status. He thought the bill would affect that. He said it was a poor bill that would bring controversy and trial lawyers would have a field day.

Dallas Erickson, Montana Citizens for Decency through Law, provided his testimony in opposition to SB 266 as well as a listing of sexual orientations, **EXHIBIT(jus20a13)**.

Lisa Lovell, representing self, identified herself as a former attorney, former clerk to Chief Justice Turnage, former corporate attorney, and now was at home with her children. She said she had focused her attentions in the last 10 years to her family and children and saw a new religion coming up in the society, which she termed "humanism". She wouldn't refer to it as a school of thought, but as a religion because she was taught that if it was a science or a school of thought, it was put out as a theory to be scrutinized, debated, and proven by evidence. She argued the theory of evolution was one of the "religions of humanism" taught in schools. She said it was not set forth as a leading theory, it was not debated and scrutinized, the evidence was not put forth. It was presented as fact. She argued religion said, "this is the way it is, join us or not, but we won't debate it." She found this humanism religion took that stance in regard to sciences in the schools. She found SB 266 to be the next logical progression in the encroachment of government into the lives of children, families, and churches. She found it a violation of the establishment clause. Within the church, the Bible was upheld as the infallible word of God. It was not debated. If the law was imposed on the church people, the government would be substituting its beliefs, contrary to the Holy Bible and the members' beliefs, and establishing that as fact by which they must run their lives and houses of worship. The Judeo-Christian tradition was diametrically opposed to this being forced on them as law. She did not want the government intruding into peoples' lives to tell them what to think, feel, believe, and who to hire. ***{Tape : 2; Side : B}***

She did not agree with **SEN. ELLINGSON**, because discrimination could already be remedied by the existing laws. She concluded by preaching from 1 Corinthians chapter 6 verses 9-13. She did not want to cram her religious views into any employer's face. She did ask the committee to uphold the Constitution, and not put their views into the people's houses of worship as employment guidelines that they had to believe. She also provided a witness statement, **EXHIBIT(jus20a14)**.

Arlene Diehl, retired home educator, said she home schooled her children because she wanted them to have a Christian education. She would guarantee the committee that passage of this bill would increase the exodus from public schools. She believed her children would consider this bill a danger to their children in terms of their education, their view of life, and their view of lifestyles.

Gary Guthrie, representing self, provided his testimony in opposition to the bill, **EXHIBIT(jus20a15)**

Harris Himes, representing self, identified himself as both an attorney and a pastor. He referred to "expressive association" as it pertained to the Boy Scouts and other groups that held homosexuality as a sin or against their viewpoint. Because of this law, SB 266 could not withstand Constitutional challenge. He felt that many groups held homosexuality as a sin, and that SB 266 could open the door to many lawsuits. He admonished that passage of the bill would indicate that this Legislature and the state condoned what many considered to be sin.

Phyllis Lamping, proxy for man from Bozeman, read a letter of a person who could not be at the hearing, **EXHIBIT(jus20a16)**.

Questions from Committee Members and Responses:

SEN. MIKE HALLIGAN asked if employers would be set up because it was difficult to determine a person's sexual orientation. **SEN. ELLINGSON** responded that the opposite result would come from the passage of the legislation. He didn't know of any Montana Supreme Court or District Court decision that had interpreted whether sexual orientation was or could be, or could not be a legitimate job related basis in and of itself. By placing it in statute, it would clarify that. For a discharge to be correct, a job related failure on the part of the employee must be present. The bill did not change job related termination in any way.

SEN. HALLIGAN questioned if an attempt was made to find job related issues, but it was a questionable case, would SB 266 give a special right for someone to come back and accuse the employer of discharging because of the person's sexual orientation and create a separate lawsuit. **SEN. ELLINGSON** replied people could always raise false claims. He practiced wrongful discharge law from the plaintiff and small business point of view. He had seen both sides of the issue and said that it was very helpful to have clarity in the law. He felt that the law as it stood lacked clarity. He argued someone could always claim they were terminated because of a violation of public policy. He said that wasn't allowed in Montana. Someone could also claim they were terminated because of race, gender, or age. They could always do that. Employer protection resided in maintaining a good employment file, and having a solid basis for a determination that the employee in question wasn't doing the job. With that solid basis for termination, termination could be done regardless of the sexual orientation.

SEN. RIC HOLDEN referred to exhibit 13, the list of sexual orientations, saying it raised concern that the bill was broad, allowing for those types of orientations. **SEN. ELLINGSON** said that if any sexual orientation had an impact on job performance, then this bill didn't protect that. A person could be terminated if the job performance was failing because of what was done on the job. If it happened to include something that was related to the listed sexual orientations, then the person didn't have a case and the discharge was not wrongful. However, private lives should be able to remain private and not be the basis for some sort of a discharge.

SEN. HOLDEN countered that essentially a person could raise this as a case because an employer would not ask the candidate if their sexual orientation centered around "toucherism" (from the list). **SEN. ELLINGSON** said it raised a couple of issues because there was some misinformation about what employers were and were not entitled to ask in the course of an employment interview. It was not allowed to ask an individual about his/her religion or marital status, or if the person planned to be pregnant or not during the employment period. Those questions weren't allowed because of protected categories under the Montana Human Rights Act. Sexual orientation was not a protected category under the Montana Human Rights Act. This bill would not make it a protected category under the Montana Human Rights Act and therefore, in the initial employment interview, the employer could ask questions about a person's sexual orientation. He rephrased **SEN. HOLDEN's** concern; suppose someone was being discharged from employment and

accused the employer of firing him/her because they found out the person was an exhibitionist (from list in **exhibit (13)**). If the exhibitionism impeded the employment on the job, then the person could be fired. If the job was not done correctly based on job-related issues and not sexual orientation, and continued employment was not merited, then the person could be fired. This bill didn't protect someone who was on the job, but not doing the job, regardless of the sexual orientation.

SEN. HOLDEN followed up asking if an employer could be concerned with having an exhibitionist on the staff and the impact that would have on the company, its public image. **SEN. ELLINGSON** said if the employee engaged in exhibitionism on the job, then he felt that was a reasonably related job qualification that could be grounds for termination.

SEN. AL BISHOP asked if a very good employee was convicted of pedophilia during the term of employment, and didn't miss any work because of a suspended sentence, but customers refused to patronize the business, would that be grounds for dismissal. **SEN. ELLINGSON** said if the model employee was a convicted pedophile and worked as a janitor in the business, the person couldn't be fired for being a pedophile. However, if the person was a manager and dealt with the public daily, then a reasonable job qualification was to keep a clean criminal record. Therefore, that manager could be terminated.

{Tape : 3; Side : A}

SEN. STEVE DOHERTY questioned his argument regarding frivolous claims by employees because sexual orientation was not evident. He noted religion also was not evident. Therefore, were there many claims because of religion? **George Bennett, attorney for the Montana Bankers Association**, said he didn't agree that sexual orientation and religion were comparable. He referenced the numerous types of orientations from **exhibit (13)** and said he felt sheltered and naive because he never considered them. He didn't realize the state didn't have a workable definition of sexual orientation, and that the bill would open up lawsuits, maybe even a narrow area, but the trial lawyers would feast.

SEN. DOHERTY wondered if including a definition of sexual orientation would be helpful. **SEN. ELLINGSON** said it was a good idea. He wasn't holding any banner in favor of the pedophiles or others listed. He offered a concise definition: "same sex, consensual relation between adults". He felt that dealt with most if not all the problems **Mr. Erickson** and **Mr. Bennett** addressed.

SEN. DUANE GRIMES asked about the implications and impacts on organizations such as churches with belief systems that were diametrically opposed to sexual deviancy. **SEN. ELLINGSON** said it was addressed by the case authority throughout the U.S. that churches had the right to inquire into the orientation of its employees. He felt it was a legitimate job-related requirement if employed by that sort of organization to adopt the tenants of that place. If the tenants could not be adopted, than that was not the place to seek employment. He acknowledged he was sensitive to that and respected the deeply held beliefs of the different religions on this question and he didn't want to infringe on their right in this particular area. He believed the bill would not interfere.

SEN. GRIMES asked if it would result in a cause of action or an attempted pressing of this issue; in regard to churches. **SEN. ELLINGSON** said no. He understood it to be settled law that a church had the right to ask these sorts of questions and could expect to have that information and obedience on the job. He wished to refer to **Beth Brenneman**.

SEN. GRIMES redirected to the former attorney and asked her if national level case law provided sufficient protection. **Lisa Lovell, representing self**, said absolutely not. She gave an example of a youth director in her church who told the youth she was lesbian. The church was up in arms and didn't know how they could release her from her duties.

SEN. GRIMES used her example and asked if the proposed legislation could be used against the church and would establish case law. **SEN. ELLINGSON** said he wanted to address one aspect of it, then he wanted to refer to **Beth Brenneman** to speak specifically about national case law. He believed that the youth director could be fired under federal law, current state law, and state law after the passage of the bill. He addressed the youth director's job-related performance issue. He thought it was incumbent upon an employer to define what an employee would do. After that definition of responsibilities, if the employee did not meet those, then it became a job-related reason to terminate. From the example, the youth director was providing a different philosophy on the issue of homosexuality than that which was part of the tenants of the church. That was a conflict and it would be easy for the employer to require adherence to the tenants of Christianity. If not, then the person could be fired and not protected by a claim of sexual orientation.

SEN. GRIMES asked if this statute could result in a testing of that protection and said it could be addressed in the close.

Beth Brennaman, legal director of ACLU of Montana, explained the establishment clause in the U.S. Constitution that forbid the courts from interfering with the internal decisions, including employment decisions, of churches. Under federal law, if employees (ministers or teachers) were hired to teach about religion, then employers could discriminate for any reason at all, including religion, race, gender, and sexual orientation. For janitors, the question was open under federal law, but a janitor in a Catholic Church could fall under those same rules. Under Montana law, there was a greater ability for a church or a private school to discriminate on the basis of those protected classes. She was adamant that if someone violated the religious tenants of a work place, even if they weren't a member of the church, that they could be terminated on that basis. She mentioned a Montana Supreme Court case, Parker Bigbag vs. Saint Labray, affirming that a district court should give summary judgment to any church or religious school defendant on the grounds of a violation of a religious tenant. She acknowledged that some baseless litigation could be brought forward for discrimination on the part of the church, but it would be a waste of time.

SEN. GRIMES recalled difficulties in writing a definition for sexual orientation in past sessions and wanted another perspective on that. **Dallas Erickson, Montana Citizens for Decency through Law**, agreed that it would be a great task to write a specific definition of sexual orientation.

SEN. DOHERTY said **Ms. Brenneman** clearly outlined federal and state law, federal Constitutional decisions and state Constitutional decisions were even more restrictive. He felt it was strongly settled law. In order to remove any doubt if the bill would pass and to assuage the fears that the bill would open up a litigation against the state's churches, would it be possible to add a clause recognizing the establishment clause? **SEN. ELLINGSON** said he would be comfortable with that type of an amendment.

SEN. JERRY O'NEIL wondered if it would behoove banks to change their employment questioning to ask about a potential employees sexual orientation if the bill passed. **Mr. Bennett** said the issue wasn't employment, it was discharge. The present law allowed a very narrow area of discharge; based on good cause, failure to satisfactorily do the job. He said an employer couldn't

discharge an employee for being Irish, Lutheran, or gay without having reasonable cause. He said if an employer terminated on the basis of a person being gay, it was a wrongful discharge. He felt by passing the bill, even to get more jobs, it would make Montana appear to be the businessman's worst nightmare. He thought potential employers would be frightened off by the bill. He reiterated that the issue wasn't about denying someone a job in the first place for being gay.

SEN. O'NEIL restated his question. If the employee was asked about being gay in the interview, denied it, then it turned out it was true, couldn't the bank fire the person for lying? Wouldn't the bill encourage discrimination during the probationary period to avoid problems after the probationary period? **Mr. Bennett** agreed with the law that these sensitive questions should not be asked. The question that should be asked was whether they could do the job and avoid the other areas that would not relate to the job. He said there were many homosexuals who performed beautifully. He restated his manta, "Don't ask, don't tell." He emphasized again that a gay could not be discharged currently without it being a wrongful discharge.

SEN. DOHERTY noted that **Mr. Bennett** felt businesses would flock away from Montana because of the law. However, **exhibit (9)** from the National Association of Social Workers, listed several major companies that had endorsed non-discriminatory employment practices. He thought that if those organizations had managed to take this step, and were in the business to make money, then maybe if Montana took this step, the state would get these big companies to come to Montana. **Mr. Bennett** clarified that he didn't mean that the bill would dampen the Montana economy. Employers wanted to hire the best employees and would hire gays and lesbians. He said that one of the wrongful discharge criteria cited failure to follow their own personnel policies. He felt those policies were part of the free market system and could contain the language of this bill. However, when getting into the area of lawsuits, that was the danger.

CHAIRMAN LORENTS GROSFIELD asked if the establishment clause only applied to churches. What about non-profit groups that were not religious in nature? **Ms. Brenneman** said the clause did not apply to non-religious organizations.

CHAIRMAN GROSFIELD asked about the Boy Scouts. **Ms. Brenneman** said that group was found to be a private association, which were not governed by public accommodations law, the law that governed employers who hired from the public. An organization had to

employ a certain number of people and have a certain status for the public accommodation laws to apply.

CHAIRMAN GROSFIELD clarified that some thresholds had to be met. **Ms. Brenneman** agreed, but said that she was not a wrongful discharge lawyer, but that **SEN. ELLINGSON** might be able to answer it better. **SEN. ELLINGSON** said an employer had the right to define the kind of job that the employee would perform. If in the definition it included certain values that the employee had to honor, maintain, and exemplify, then those could be spelled out. If the employee did not follow those values, then there would be a legitimate ground to terminate regardless of sexual orientation.

{Tape : 3; Side : B}

CHAIRMAN GROSFIELD brought up the issue of small Montana and the retailer in that little town. He guessed that those small retailers did not have a very thorough personnel policy with express provisions. In the absence of that, where were we? **SEN. ELLINGSON** replied that in the absence of a thorough personnel policy and in the absence of a probationary period, when a hire was made, the presumptive probationary period was one year. If in that time, the employer found out something that he/she did not particularly care for, then they could terminate for whatever reason. After that probationary time, the person could not be terminated if it came to light that the person was homosexual. He acknowledged that it could be uncomfortable, but he suggested that some discomfort was OK. If that individual did a good job, just as he/she did during the probationary period, then that person should be allowed to live his/her private life just as anyone else.

CHAIRMAN GROSFIELD complicated the scenario by saying there were two drugstores in small town Montana. An employee of one of them came out as gay. The townspeople didn't agree with that lifestyle and refused to do business at the drugstore with the gay employee. What then? **SEN. ELLINGSON** had two comments. 1) it was not a wrongful discharge if there was a reasonable, legitimate business reason for the termination. In that scenario, there would be reasonable business reason to terminate. However, 2) he likened that scenario to white merchants of the south 20 years ago. The merchant who took a risk and hired the hard-working black person, but then the town turned against the business. He proposed that those were tough moral questions. He felt it was easy now to say to the retailer in the south that they needed to stick to their guns and do the right thing

although that imposed a cost upon that person. He believed it would be best for the small town to hold a town meeting to discuss that dilemma together to develop a reasonable resolution.

CHAIRMAN GROSFIELD spoke about the amendment that changed good cause, #5 on **exhibit (17)**. He said the new language to sub5 was a specific exclusion. By stating it that way, it did not provide an exception for a legitimate business concern. **SEN. ELLINGSON** said he did not want this language to interfere with churches or other organizations who would legitimately want to discriminate for sexual orientation.

CHAIRMAN GROSFIELD questioned the testimony that people would pull their children out of public school. The policy that was adopted by the former governor, did that apply only to state government or did it apply to schools as well? Also, where did it leave school boards in making decisions on the local level? **SEN. ELLINGSON** believed that the directive dealt only with state employees and not other public employees within the state. In regard to the school board the bill would pretty much leave them as they were. Another proposed bill wanted fingerprinting of teachers to protect the children against heterosexual predators. He felt the principle that people didn't want teachers making sexual advances on the children applied whether it was a homosexual or heterosexual. He stated SB 266 gave no special protection to gays nor lesbians, over and above the protection provided to heterosexuals.

CHAIRMAN GROSFIELD asked for comment on the implications on sex education. **SEN. ELLINGSON** said that the sex ed issue was determined locally by the local school boards. Those local boards should determine the content of sexual education programs and the individual hired to teach that program had an obligation to teach the curriculum; not teach what he/she thought was OK in his/her private life. It didn't matter whether the teacher was a homosexual or a heterosexual.

SEN. GRIMES mentioned progressive discipline and that when that was started, many times claims would occur. This further complicated the matter. He wondered if that would also happen in this case. **SEN. ELLINGSON** acknowledged there was always the possibility of frivolous litigation and claims. The line of protection against that would be the lawyer. Hopefully the lawyer would make an objective evaluation of the claim and if it was unfounded, then the lawyer would not file a suit. He wouldn't say that frivolous claims would not be made, because people were ingenious. However, employers should keep track of

the employee during the probationary period, and could let them go if it didn't work. After that, documentation needed to be kept on what was good and bad about the employee before termination could correctly take place.

Closing by Sponsor:

SEN. ELLINGSON closed on SB 266. He addressed the concerns of the opponents beginning by quoting, "no law can change a person with a vengeful heart." He respectfully disagreed because laws were a secular guidepost in how to run a moral and equitable society. He said he recalled the Declaration of Independence that said, "we are all created equal and entitled to certain inalienable rights." He said those were guideposts to him and most people. He said the Constitution, and the Bill of Rights also served as guideposts. He argued that everyone was entitled to equal treatment under the law and it should not be denied. He felt these were teaching guideposts that laws could help to change a vengeful heart. He challenged the point that currently people could prosecute for discharge over being gay or lesbian, but he countered that the history of the court today said that was not the case. Successful actions had not been brought on behalf of discharge because of sexual orientation. If such a case did go, he thought the judge would be required to determine whether sexual orientation fell within the scope of good cause. He felt SB 266 would clarify the law. On the other hand, some people felt SB 266 would interfere with private employment relations. He respectfully disagreed with that too. He felt the bill was narrow. If a defined probationary period did not exist, an employer had one year to terminate for any reasons, and after that, then the prohibitions of this bill would take affect. He gave the committee the ability to include a definition of sexual orientation and provide a specific recognition that churches and private organizations could retain their abilities to discriminate as they could now. SB 266 protected only those employees who did a good job, surpassed the probationary period, fell into the narrowly defined definition of sexual orientation from termination based on their sexual orientation alone. Qualities of private lives unrelated to job performance or merit should not be grounds for termination. He closed saying Martin Luther King Jr. was once discounted and it took courage to stand with him then. He felt it took courage to stand with those with a different sexual orientation than most, but it was not alright to discriminate against them in the workplace just because of their private lives. He said it was controversial to end the discrimination and he asked the committee to be courageous in the face of the facts.

CHAIRMAN GROSFIELD expressed his thanks and appreciation for all the witnesses in dealing with a difficult issue. He felt mutual respect was shown and maintained.

s applied for employment a truthful statement of the reason for such charge.

History: En. Sec. 1, p. 257, L. 1891; amd. Sec. 3390, Pol. C. 1895; re-en. Sec. 1755, v. C. 1907; re-en. Sec. 3092, R.C.M. 1921; re-en. Sec. 3092, R.C.M. 1935; R.C.M. 1947, 1309.

39-2-803. Blacklisting prohibited. If any company or corporation in s state authorizes or allows any of its agents to blacklist or any person does icklist any discharged employee or attempts by word or writing or any other ans whatever to prevent any discharged employee or any employee who may ve voluntarily left the company's service from obtaining employment with other person, except as provided for in 39-2-802, such company or poration or person is liable in punitive damages to such employee so evented from obtaining employment, to be recovered by him in a civil action, d is also punishable as provided in 39-2-804.

History: En. Sec. 2, p. 258, L. 1891; amd. Sec. 3391, Pol. C. 1895; re-en. Sec. 1756, v. C. 1907; re-en. Sec. 3093, R.C.M. 1921; re-en. Sec. 3093, R.C.M. 1935; R.C.M. 1947, 1310; amd. Sec. 7, Ch. 397, L. 1979.

ross-References
Punitive damages, 27-1-220, 27-1-221.

39-2-804. Violation of part a misdemeanor. Every person who olates any of the provisions of this part relating to the protection of discharged nployees and the prevention of blacklisting is guilty of a misdemeanor.

History: En. Sec. 650, Pen. C. 1895; re-en. Sec. 8407, Rev. C. 1907; re-en. Sec. 11219, .M. 1921; re-en. Sec. 11219, R.C.M. 1935; Sec. 94-3655, R.C.M. 1947; redes. 41-1325 by c. 29, Ch. 513, L. 1973; R.C.M. 1947, 41-1325.

Penalty for misdemeanor, 46-18-212.

ross-References
Classification of offenses, 45-1-201.
Misdemeanor defined, 45-2-101.

Part 9
Wrongful Discharge From Employment

39-2-901. Short title. This part may be cited as the "Wrongful Discharge om Employment Act".

History: En. Sec. 1, Ch. 641, L. 1987.

39-2-902. Purpose. This part sets forth certain rights and remedies with spect to wrongful discharge. Except as limited in this part, employment ving no specified term may be terminated at the will of either the employer the employee on notice to the other for any reason considered sufficient by e terminating party. Except as provided in 39-2-912, this part provides the clusive remedy for a wrongful discharge from employment.

History: En. Sec. 2, Ch. 641, L. 1987.

39-2-903. Definitions. In this part, the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of nployment by an employee because of a situation created by an act or omission the employer which an objective, reasonable person would find so intolerable at voluntary termination is the only reasonable alternative. Constructive scharge does not mean voluntary termination because of an employer's

refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.

(5) "Good cause" means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).*

(6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.

(7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

History: En. Sec. 3, Ch. 641, L. 1987; amd. Sec. 3, Ch. 193, L. 1993.

39-2-904. Elements of wrongful discharge. A discharge is wrongful only if:

(1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(3) the employer violated the express provisions of its own written personnel policy.

History: En. Sec. 4, Ch. 641, L. 1987.

39-2-905. Remedies. (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-2-904(1).

(3) There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress,

SENATE JUDICIARY
Exhibit No. 3
Date 1/25/01
Bill No. SB266

* THE SEXUAL ORIENTATION OF AN EMPLOYEE IS NOT A REASONABLE JOB RELATED GROUNDS FOR DISMISSAL.

SENATE JUDICIARY
Exhibit No. 4
Date 1/25/01
Bill No. SB 266

Kristine A. Marsh
4443 Prairie Dr.
Helena, MT 59602
Hm (406) 443-7229
Wk (406) 723-5489

PROPONENT - SB 266
LEGISLATIVE TESTIMONY

Chairman ~~Shockley~~ Crosfield, committee members, my name is Kristine Marsh. I am a Licensed Clinical Social Worker. Currently I am the Director of Services to Children and Families with Western Montana Mental Health Center in Butte. I am proud to say that my current employer practices non-discrimination. However.....

Two years ago I left a Montana job that I loved. I was subjected to a year and a half of discrimination from an Executive Director and a Board of Directors who stopped seeing me as a dedicated employee once they discovered that I have a same sex life partner.

My former employer had a very rigorous evaluation method that included gathering feedback from the clients, community agencies and staff that I served. My evaluation ratings were "Above Average" to "Excellent". My loyalty to the agency and it's mission, the very things that made me a valuable and effective employee, also made me painfully vulnerable to the bigoted remarks and actions that my employer felt justified in waging toward me. He pointed out to me several times that federal and state law supported his position.

We live in a complex world. Like it or not, differences exist. Most of us would agree that it is wrong to categorize people. Unfortunately it happens. Prejudice towards homosexuality, among other things, continues to be fed by fear, ignorance, misunderstanding and closed-mindedness.

Can I just tell you how frightening and dehumanizing it was to have the value of my life, my work and my family, disregarded and degraded because my Montana employer felt empowered to reduce me to a stereotype.... because my employer felt validated by Montana's legislative in-action to recognize and protect my rights.

I know that I am asking you to support a bill that is not popular. I know you can't change the minds and hearts of individuals. But you can set a standard that we can all benefit from. I need you to be strong leaders. I need you stand up for me.

TESTIMONY IN SUPPORT OF SB266

January 25, 2001

Karl Olson
POBox 775, Helena MT 59624
(406)442-9322
pride123@aol.com

ATE JUDICIARY
ibit No. 5
1/25/01
SB 266

Good morning Senators.

My name is Karl Olson and I am the director of PRIDE.

PRIDE is a non-profit organization that serves as a voice for, and advocates on behalf of, Montana's lesbian and gay community.

In 1998 PRIDE received a letter from the CEO of one of this state's largest employers. The CEO told us that in his company "job-related criteria, merit and just cause are currently the only criteria for making employment decisions and that discrimination related to sexual orientation should not take place". Shortly thereafter, this CEO directed his company's personnel division to include sexual orientation in the company's nondiscrimination policy, turning good faith into good policy.

The CEO I am referring to is former Governor Mark Racicot. The "company" I refer to is the State of Montana. Last December Racicot's directive finally took effect and today state government workers enjoy a measure of fairness that all workers in Montana should expect.

A lot of discussion in this building focuses on Montana's economic future. As you

engage in these discussions I encourage you to not only look at the bottom line, but to look at a principled line. These two lines can intersect. The ability to discriminate does nothing to improve a company's profits or a state's prosperity.

Fair business practices are good business practices. A workplace where workers do not have to fear discrimination is a productive workplace. An environment that values creativity, talent and hard work over status is a competitive environment.

I have witnessed the harm inflicted by workplace discrimination. I have listened as a supervisor bragged that he would never hire a gay person -- while a gay person was in fact increasing his company's revenue and improving customer service. At PRIDE we get several calls a month from individuals who fear they will lose a job due to anti-gay bias. We get calls from around the country from workers who are planning to relocate and want to know if they will be judged by their job performance and treated with equality. I talk to many young people across Montana who tell me that they dream of the day when they can leave the state. They are desperate to find a place where bias is not tolerated.

If these stories, these lives, are not familiar to you, then I encourage you to imagine a world where you are excluded from the American dream, not because of what you do, but because of who you are. My parents remember a day when a black person was not allowed on the golf course to compete for a million dollars. My grandparents remember a day when a Catholic could not become president. Each bias was justified with great passion and certainty. And each form of discrimination has, with the march of progress, become unacceptable.

I urge you to pass SB266 out of committee.

SENATE JUDICIARY
Exhibit No. 6
Date 1/25/01
Bill No. SB 266

to: Senate Judiciary Committee
from: Daniel Casey
representing: The Montana Human Rights Network
regarding: Senate Bill 266, sponsored by Senator Jon Ellingson

Mr. Chairman, Members of the Committee, my name is Daniel Casey, and I represent the Montana Human Rights Network.

Discrimination -- the word, discrimination -- elicits an almost automatic response from us, and that response is overwhelmingly negative.

However, it is the connotation, or the recently-evolved definition of the word, "to make a difference on a basis other than actual merit", which we understand as negative, rather than the older denotation of the word, which is simply "to distinguish, or differentiate".

We all discriminate. We discriminate when we order from a menu, and we discriminate when we pick out a necktie at the store. In fact, we say that a person who prefers the finest in food and clothing has "discriminating taste."

All employers discriminate. They do and they should discriminate, in the older sense of the word. They differentiate among the applicants during the hiring process, according to pertinent criteria: qualifications, experience, enthusiasm, interpersonal skills. An employer is continuously distinguishing between his/her employees, noting which ones show initiative, follow instructions, demonstrate a positive attitude.

Moreover, in the unfortunate instance when an employer needs to let one of his/her workers go, that decision has been arrived at through a process of 'old-definition' discrimination. There are acceptable criteria for that, namely, the employee's attendance and quality of work performance.

However, there are also socially and legally unacceptable criteria for discharging an employee: race, national origin, sex, age, disability, creed, religion, political belief, color, marital status -- firing somebody on any of those or other similar grounds constitutes 'new-definition' discrimination -- the kind we recognize as negative.

SENATE JUDICIARY
Exhibit No. 7
Date 1/25/01
Bill No. SB 266

TO: Montana Senate Judiciary Committee

RE: Senate Bill 266

DATE: January 25, 2001

Chairman & Members of the Committee:

I strongly urge you to support SB 266 protecting all employees in our state from wrongful discharge based on his or her sexual orientation.

I should be judged on whether or not I need to hold a job based on my qualifications and ability to do the job. Not some trait or characteristic subject to our employers' whimsy or personal prejudices.

Economic and employment opportunities in Montana are dwindling — not burgeoning. Don't make it even less attractive by keeping our employment policies discriminatory! I urge you to pass this bill. It's simply a question of fairness.

Sandra L. Hale
415 ½ No. Beattie
Helena, MT 59601

SENATE JUDICIARY
Exhibit No. 8
Date 1/25/01
Bill No. SB266

Testimony of Patti Keebler, Montana State AFL-CIO, in support of SB 266 in hearings before the Senate Judiciary Committee, January 25, 2001

Mr. Chairman and members of the committee, for the record my name is Patti Keebler and I'm with the Montana State AFL-CIO. On behalf of the over 42,000 AFL-CIO working families in Montana, I urge your support for Senate Bill 266.

Because it is currently legal to fire working women and men because of their sexual orientation, working people are being denied employment on the basis of something that has no relationship to their ability to perform their work.

The Montana AFL-CIO strongly believes that employment discrimination based on sexual orientation is wrong and un-American. And in this belief, America's unions join hundreds of civil rights organizations, religious institutions and responsible employers in urging an end to this legal discrimination.

Our support of repealing discrimination for sexual orientation goes hand in hand with our work towards affirmative action, civil rights enforcement, pay equity and advancement of rights of persons with disabilities.

The labor movement has a rally cry that is very appropriate for this issue: **An injury to one is an injury to all.**

Mr. Chairman and members of the committee, we urge your support of Senate Bill 266. Thank you for considering the views of Montana's working families.

NASW
NATIONAL ASSOCIATION
OF SOCIAL WORKERS
Montana Chapter

SENATE JUDICIARY
Exhibit No. 9
Date 1/25/01
Bill No. SB 266

Chairman Grossfield, members of the committee, my name is Colleen Murphy. I am the Executive Director of the Montana Chapter National Association of Social Workers. We are a professional membership association with 950 social work members, whose mission is to advocate for social work professionals and the clients they serve. I am here today to encourage you to pass SB 266.

Our Code of Ethics states the following; "Social workers should act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of race, ethnicity, national origin, color, sex, **sexual orientation**, age, marital status, political belief, religion, or mental or physical disability."

America's progression against prejudice and discrimination has been one of the remarkable chapters in this nation's history. Yet the civil rights revolution remains incomplete. Social Workers adamantly believe that every worker should be judged solely on their ability to perform the job. People who work hard and perform competently should not be kept from leading productive and responsible lives-paying their taxes, covering their mortgages and contributing to the ecomonic life of the state. This is simple justice.

Poll after poll demonstrates the employment non-discrimination enjoys the support of over two thirds of the American public, including a majority of Republican voters. In addition, non-discrimination employment practices have been endorsed by dozens of corporations including AOL, AT&T, Bell Atlantic, Eastman Kodak, Merrill Lynch, The Prudential Insurance Company, the Quaker Oats Company and Xerox. HB 266 does not create any special rights. Rather it protects a right that should belong to every citizen – the right to be free from job discrimination based on irrational fear.

As our state faces very tough economic challenges, we should send a signal that merit and hard work- not biases and stereotypes-are what counts in job opportunities within the labor market. Montana social workers urge you to support SB 266.

25 South Ewing Suite 406
Helena, MT 59601
406/449-6208
fax 406/449-2533

SENATE JUDICIARY
Exhibit No. 10
Date 1/29/01
Bill No. SB266

The Montana Trial Lawyers Association supports SB 266.

This bill simply protects employees who have been doing their job, but who may be fired solely because of their sexual orientation.

Passage of this bill does not bestow any special rights. It just says what should be obvious - that you can only discharge someone because they are not doing their job, that discharge is not lawful simply because you do not approve of an employee's life outside of the work place.

SENATE JUDICIARY
Exhibit No. 11
Date 1/25/01
Bill No. SB 266

Mr. Chairman and members of the Committee

My name is Jenny Dodge, and I am a small business owner in Helena

There is no need to add the language "sexual orientation" to current statutes because Montana law already provides adequate employee protection from discharge due to discrimination.

Let me explain.

In the past, Montana law did allow employers to fire employees without good cause. Montana is one of the few states to repeal this law and supersede it with "wrongful discharge." "Wrongful discharge" states that a nonprobationary employee may not be discharged without good cause." "Good cause" is defined by statute 39-2-903, to mean, "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."

When reading through several "wrongful discharge" cases, I discovered that the employer cannot discharge a nonprobationary employee without a preponderance of evidence and furthermore, if the employer does not provide just cause, he/she is in violation of state law.

In most employment discrimination cases "burden-shifting analysis" is implemented. This analysis provides more opportunity for the employee to provide evidence of discrimination than for the employer to dismiss it. This procedure gives the employee sufficient opportunity to provide a preponderance of evidence and then the burden shifts to the employer to give reason for dismissal. From there, the employee is given a chance to provide evidence that the employer's reasons are false.

From the information given, it is obvious that all employees are protected from discrimination in this state.

Montana statutes, Montana's Constitution and fourteenth amendment in the U.S. Constitution give all citizens equal protection from discrimination.

Since homosexuals are already protected from wrongful discharge, it is obvious that the purpose of adding "sexual orientation" to current statutes is an attempt by the homosexual lobby to obtain special rights or status by legitimizing their sexual behavior.

Jenny Dodge
small business owner, Helena, MT
449-5606

SENATE JUDICIARY
Exhibit No. 12
Date 1/25/01
Bill No. SB266

25 January 2001

Mr. Chairman and members of the committee:

For the record my name is Julie Millam, executive director of Christian Coalition of Montana, our state's largest family advocacy organization representing 40,000 households in Montana, many of whom are small business owners.

This legislation before you today is still apart of the same agenda that has been pushed since 1993. This is not a new bill but a further attempt by the homosexual lobby to advance their agenda-one that will settle for nothing less than having codified into law the words "sexual orientation." as a constitutionally protected class.

First, this legislation constitutes a major expansion of government power over the workplace, and we know too well how the clumsy, heavy hand of the government can wreak havoc on small businesses and local communities. This bill would open the door for government enforcers to begin affirmative action to enforce quotas in hiring. Employers would be forced to learn more about their employees sex lives in order to defend themselves against possible lawsuits; this will constitute an enormous and wholly unwarranted intrusion into people's private lives.

This bill callously disregards the fact that some sexual conduct is relevant to employment, such as in the areas of education and child care. Parents and school administrators should have rightful concern over the conduct of those who will be teaching or working with their children. Pedophiles are included in the "sexual orientation" category and will argue that they are homosexuals who merely prefer younger partners. One can only imagine the serious problems that will occur. For instance, a banker could be sued for refusing to loan money to a movie maker who makes child or homosexual pornography, since it could be discriminating on the basis of "sexual orientation". Or what would the state do if they found a pedophile employed in a job that involved supervising under age children that are wards of the state? Or what about a pastor/church who holds to the biblical doctrine that deviant sexual conduct is wrong be drug to court over dismissing someone who openly admittedly engages in deviant sexual behavior? Or in the workplace how would an employer who had in good faith, interviewed and hired a gentleman to work in their exclusive clothing store handle that same person who showed up for work dressed in drag?

Now let us consider that this bill affords special protection to those who fail to meet the three-pronged test set by the U.S. SUPREME Court that awards special protection status to a disadvantaged group.

Criterion 1: *A history of discrimination evidenced by lack of ability to obtain economic mean income, adequate education, or cultural opportunity.*

Homosexuals have an annual average household income of $55,430 verses $32,144 for the general population, $12,166 for disadvantaged African American households. More than three times as many homosexuals as average Americans are college graduates, hold professional of managerial positions making them more advantaged in the job market than true minorities. In truth they are one of the nation's most educated and affluent, segments of society-hardly an analysis of a disadvantaged group.

Criterion 2: *Specially protected classes should exhibit obvious, immutable or distinguishing characteristics like race, color, gender or national origin, that define them as a discreet group.*

There is still no credible scientific evidence that proves otherwise. Flawed and biased genetic studies have been invalidated by the scientific community. Masters and Johnson reported a 79.1% success rate for clients who discontinued their homosexual practices. Exodus International and other ministries have great success helping homosexuals to come out of a lifestyle that is plagued with disease and death. Which proves without a doubt that homosexuals can and do change. Thousands leave the lifestyle the lifestyle every year. The US Constitution has ***never*** extended protection based solely on a ***behavior.***

Criterion 3: *"Protected classes" should clearly demonstrate political powerlessness.*

The National Gay and Lesbian Lobby and the National Human Rights Campaign are powerful political advocacy groups. They have dumped millions upon millions of dollars into the last campaign cycle and have a lobbying presence on Capitol hill. I would urge each of you to visit "www.gaymontana.com and see for yourselves their political agenda for our state.

So before we entertain giving homosexuals special rights based solely on ***behavior,*** we must consider the enormous ramifications, and increased litigation will we will see in the courts over wrongful discharge suits. Consider employers in the workplace, Pastors in their churches, and the state's responsibility to provide protection in care for our children.

Over the years Montana's newspaper polls have consistently reflected Montana citizens overwhelmingly disapprove of "special rights" based solely on sexual orientation. Is this Legislature ready to ignore the deep held feelings of it's citizens, establish another layer of affirmative action based solely on sexual ***behavior***?? On behalf of the 40,000 households I represent, I urge you to please vote no on SB 266.

Respectfully Submitted,
Julie Millam, executive director

Montana Citizens for Decency through Law, Inc.
P.O. Box 4071 • Missoula, Montana 59806 • (406) 777-5862 • Fax: (406) 777-5025
e-mail: home@familyconnect.com

SENATE JUDICIARY
Exhibit No. 13
Date 1/25/01
Bill No. SB 266

Officers

Dallas D. Erickson
President
Wayne Fisher
Vice President
Helen Hacket
Secretary

Board of Directors:

Dianne Baker, Chair
Stevensville
Jenny Erickson
Stevensville
Tom McGillvray
Billings
Caroll Smith
Billings
Dean Randash
Helena
Georgia Branscome
Kalispell
Kitty Roberge
Dayton
Beccy Waldum
Livingston

Church Liaison

Father Ray Nyquist
Black Eagle
Arlette Randash
Helena

Testimony
Senate Bill 266

Senate Judiciary Committee
January 24, 2001

Mr. Chairman and Members of the Committee,

I searched the Montana Codes Annotated and only found one reference to "sexual orientation" and that was in 33-20-1313 and has something to do with insurance.

That means that this bill would exempt those with the following sexual orientations from being fired for their deviancy:

(Included Form)

Please don't force this bill on those who have care of our youth and our society in general.

Dallas Erickson

Board of Advisors
John C. Moe, Retired FBI Agent and Sheriff of Missoula County 1970-78 Dr. Mark Mozer, Clinical Psychologist, Helena
Jerry Nordstrom, M.S.W., Psychotherapist, Helena Mark Bryan, Esq., Attorney, Bozeman Cameron Ferguson, Esq., Attorney, Great Falls
Jim Ramsey, M.A. Family Counselor, Missoula Randy Vogel, Billings Police Dept-Retired Rev Keith McNeil, Retired Pastor Corvallis Community Church
Former Chief Addison Clark, Kalispell Police Department Dean Rodney K. Smith, Past Dean and Professor of U of M Law School, Little Rock, Ark.
Karolin Loendorf, Commissioner - Lewis & Clark County - Helena, Chaplain Maggie Brown, Kalispell Police Department
Steve Atkin, Esq., Attorney and Librarian at the U of M College of Technology

SEXUAL ORIENTATIONS

APOTEMNOPHILIA- sexual arousal associated with the stump(s) of an amputee

ASPHYXOPHILIA- sexual gratification derived from activities that involve oxygen deprivation

AUTOEROTIC ASPHYXIA- sexual gratification derived from an activity in which the individual masturbates while depriving him or herself of oxygen through hanging, strangulation, or other means; this activity is incredibly dangerous and causes many inadvertent deaths each year

BISEXUAL- the capacity to feel erotic attraction toward, or to engage in sexual interaction with, both males and females

COPROPHAGIA- sexual gratification derived from eating feces

COPROPHILIA- sexual arousal associated with feces

EXHIBITIONISM- the act of exposing one's genitals to an unwilling observer to obtain sexual gratification

FETISHISM/SEXUAL FETISHISM- obtaining sexual excitement primarily or exclusively from an inanimate object or a particular part of the body

FROTTEURISM- approaching an unknown woman from the rear and pressing or rubbing the penis against her buttocks

GAY/HOMOSEXUAL- people who form sexual relationships primarily or exclusively with members of their own gender

GERONTOSEXUALITY- distinct preference for sexual relationships primarily or exclusively with an elderly partner

INCEST- sex with a sibling or parent

KLEPTOPHILIA- obtaining sexual excitement from stealing

KLISMAPHILIA- erotic pleasure derived from enemas

LESBIAN- a homosexual female

LEWDNESS- sexually unchaste; inciting to lust or debauchery

MASTURBATION- erotic stimulation of one's own genitals

NECROPHILIA- sexual arousal and/or activity with a corpse

PARAPHILIA- a condition in which a person's sexual arousal and gratification depend on fantasizing about and engaging in sexual behavior that is atypical and extreme

PARTIALISM- A fetish in which a person is sexually attracted to a specific body part exclusive of the person

PEDERASTY- Sex between an adult and a child, usually an adult male and a male child

PEDOPHILIA- Sexual contact between an adult and a child

BISEXUAL PEDOPHILIA- term used for an adult who derives sexual gratification from sexual contact with a child without regard to the sex of the child

HETEROSEXUAL PEDOPHILIA- term used for an adult who derives sexual gratification from sexual contact with a child of the opposite sex

GAY PEDOPHILIA- term used for a male adult who derives sexual gratification from sexual contact with a child of the same sex

LESBIAN PEDOPHILIA- term used for a female adult who derives sexual gratification from sexual contact with a child of the same sex

PROSTITUTION- the act or practice of offering sexual stimulation or intercourse for money

SEXUAL MASOCHISM- obtaining sexual gratification by being subjected to pain or humiliation

SEXUAL SADISM- the intentional infliction of pain or humiliation on another person in order to achieve sexual excitement

TELEPHONE SCATALOGIA- sexual arousal associated with making or receiving obscene phone calls

TOUCHERISM- characterized by a strong desire to touch the breast or genitals of an unknown woman without her consent; often occurs in conjunction with other paraphilia

TRANSSEXUAL- a person whose gender identity is different from his or her anatomical gender

TRANSVESTITE - a person who is sexually stimulated or gratified by wearing the clothes of the other gender

UROPHILIA- sexual arousal associated with urine

VOYEURISM- obtaining sexual arousal by observing people without their consent when they are undressed or engaged in sexual activity

ZOOPHILIA/BESTIALITY- engaging in sexual activity with animals

CCV

CITIZENS COURIER
CINCINNATI, OHIO
SUMMER 2011

MONTANA STATE SENATE

SENATE JUDICIARY
Exhibit No. 14
Date 1/25/01
Bill No. SB 266

+++++ WITNESS STATEMENT +++++

NAME Lisa Love LL

ADDRESS 2608 Gold Rush

HOME PHONE: 449 0525 **WORK PHONE:** same

REPRESENTING Self

APPEARING ON WHICH PROPOSAL ? S 266

DO YOU: **SUPPORT**____ **OPPOSE** X **AMEND**____

COMMENTS:

AS a Lawyer, I believe that this proposed Law violates the "Establishment Clause" in the most offensive WAY. If it passes, the government will be Establishing A SET of Religous beliefs contrary to the Judeo-Christian Law as SET forth in the Holy Bible. Those who practice the tradutional Judeo-Christian faiths will be ordered TO substitute their beliefs for the new "beliefs" Established by the Government, in how they staff & run their houses of worship. THIS is offensive. It is illegal as TO religious Employers. I oppose it and urge you TO also.

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

Exhibit 2 Thank you for allowing me to address this committee this morning.

SENATE JUDICIARY
Exhibit No. 15
Date 1/25/01
Bill No. SB266

2 TYPES OF RIGHTS

~~Adding rights groups to the State's hate crime statute:~~ I have heard a lot about rights today. I see this bill as an attempt to ~~Gain Specific~~ rights for a specific group of people based on behavior

I see two kinds of rights. Natural rights are those delineated in the Declaration of Independence and the Bill of Rights. These include the right to life, the pursuit of happiness, and to be secure in our property. **These natural rights can be exercised and enjoyed without impinging on anybody else's rights- cutting into their freedom or their pocketbook.**

The other type of right is created by a government. This type of right can only be exercised at somebody else's expense- their freedom or their money. ~~The so-called right to health care, for instance can only be granted to you by government if someone else pays for it. This is because government doesn't create anything. If only reallocates. It can't do anything good for one group without taking something away from a different group.~~

How far should government go in creating special rights groups? Let me give you an extreme example. As you can see I am bald. I have gotten comments like put on a hat so you don't blind us, or you have a folically challenged head. Who knows I may have even been denied a job because I am bald. ~~Maybe someone has been beaten up because they are bald.~~ Should government give me a special right to combat this type of abuse? What would this committee do if a large group of bald people wanted a law to protect their rights? Wouldn't this type of law impinge the rights of other groups? **I am not in favor of government granting any new created rights at the expense of other groups.** These comments don't personally bother me. I answer back are you part of our law maintained harmony for any special group based on beh

Thank you

Gary J. Smith

Subj: **Fwd: Re: SB266**
Date: 01/24/2001 9:01:16 PM Mountain Standard Time
From: white@gomontana.com (Steve White)
To: armsovluv@aol.com

SENATE JUDICIARY
Exhibit No. 16
Date 1/25/01
Bill No. SB266

Date: Wed, 24 Jan 2001 19:59:07 -0700
To: mtcc@in-tch.com
From: Steve White
Subject: Re: SB266

It was a Word document. Here is the text. Use cut and paste to build a new document, print and then copy. Sorry for the delay, I was in Billings today.

Testimony in Opposition to SB266
Stephen White
Bozeman, MT

The contention of the proponents of SB266 that Montana's statutes need to include "sexual orientation" as a civil right is inapplicable. In order for equal protection or a civil right status, there must first be an identifiable "suspect class", and second, the "suspect class" must be treated dissimilarly by the statute in question.

A "suspect class" is a group of people who share common and recognizable "immutable characteristics". And because of such distinctive traits, are given special treatment in law. Examples of such traits already include race, gender and national origin. Neither the US Supreme Court or Montana Supreme Court decisions consider homosexuality or sexual preference as a suspect class. Decisions include; Palmor v. Sodoti (1984), Craig v. Boren (1976), Graham v. Richardson (1971), Mathews v. Diaz (1976). Therefore, homosexuals do not constitute a constitutionally recognizable class as required by law. Shared attitudes of preferences of any kind does not establish a recognizable class, since they are subject to change (Buchanan v. Kentucky (1987)).

Wyoming's legislature recently dealt with the issue of adding sexual orientation to its hate crimes law, and concluded that hate crime statutes were not necessary for their state. They did not minimize Matthew Shepard's suffering because he was gay. If those accused of that terrible crime are found guilty then they should be punished fully. If that means the death penalty, then so be it.

Montana's statute does not need SB266. Adding 'sexual orientation' to the list of civil rights cases in this statute solves nothing, other than promotes a lifestyle that is both dangerous and wrong. The majority of Montanans disagree with the homosexual lifestyle, and also modifying our laws to give special consideration to a behavior.

In conclusion, I agree with the wording found in the Crime plank of the Montana Republican Party: "We support the clear will of the people of Montana expressed by legislation to keep homosexual acts illegal"

I ask that this committee table SB266.

———————— Headers ————————
Return-Path: <white@gomontana.com>
Received: from rly-yd02.mx.aol.com (rly-yd02.mail.aol.com [172.18.150.2]) by air-yd02.mail.aol.com (v77.31) with ESMTP; Wed, 24 Jan 2001 23:01:16 -0500
Received: from gomontana.com (iris.gomontana.com [205.138.102.10]) by rly-yd02.mx.aol.com (v77.27) with ESMTP; Wed, 24 Jan 2001 22:59:01 -0500
Received: from steve (216.166.176.167) by gomontana.com with SMTP (Eudora Internet Mail Server 3.0.1) for <armsovluv@aol.com>; Wed, 24 Jan 2001 20:54:24 -0700
X-Sender: white@mail.gomontana.com
X-Mailer: QUALCOMM Windows Eudora Pro Version 4.0
Date: Wed, 24 Jan 2001 20:55:07 -0700
To: armsovluv@aol.com
From: Steve White <white@gomontana.com>
Subject: Fwd: Re: SB266
Mime-Version: 1.0
Content-Type: text/html; charset="iso-8859-1"
Content-Transfer-Encoding: quoted-printable
Message-ID: <1231727632-1357494@gomontana.com>

Amendments to Senate Bill No. 266
1st Reading Copy

Requested by Senator Jon Ellingson

For the Senate Judiciary Committee

Prepared by Valencia Lane
January 23, 2001 (3:01PM)

1. Title, line 4 through line 5.
Following: "EMPLOYMENT" on line 4
Strike: remainder of line 4 through "IF" on line 5

2. Title, line 5.
Following: "ORIENTATION"
Insert: "IS NOT FOR GOOD CAUSE"
Strike: "SECTIONS 39-2-904 AND 39-2-912"
Insert: "SECTION 39-2-903"

SENATE JUDICIARY
Exhibit No. 17
Date 1/25/01
Bill No. SB266

3. Page 1, line 10 through line 27.
Strike: sections 1 and 2 in their entirety
Insert: **"Section 1.** Section 39-2-903, MCA, is amended to read:

"39-2-903. Definitions. In this part, the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer ~~which~~ that an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge ~~as defined in subsection (1)~~ and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in

force on the date of the termination.

(5) "Good cause" means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4). <u>The sexual orientation of an employee is not a reasonable job-related grounds for dismissal.</u>

(6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.

(7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule."

{*Internal References to 39-2-903:*
OK 2-18-101 }"

- END -